



INTEROFFICE MEMORANDUM

TO: KATHERINE FERNANDEZ RUNDLE
State Attorney

DATE: MAY 19, 2020

FROM: STAFFING/REVIEW TEAM

RE: POLICE SHOOTING CLOSEOUT MEMO
INJURED: FERNANDEZ, Eric (Sgt.)

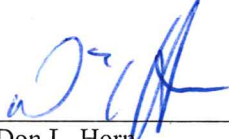
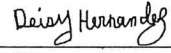
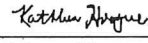
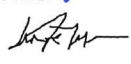



Based on the information obtained and reviewed during the course of the investigation, the conclusion of the staffing/review team is the following: Both, Sgt. Eric Fernandez and Officer Edward Portal work for the Doral Police Department. Sgt. Fernandez is a certified instructor and scheduled an impromptu training on the day in question.

Trainees were instructed to be unarmed and only use a red training gun, which emitted a red laser. Per witness statements, only Officer Portal was allowed to remain armed in the event that police action became necessary.

During one of the training exercises, Officer Portal discharged his departmentally issued firearm and struck Sgt. Fernandez in the chest. Sgt. Fernandez was transported to the hospital and made a full recovery. The shooting officer was represented by an attorney, who confirmed that he would not be providing a statement or proffer. The on-call Assistant State Attorneys assigned to police shootings were not notified.

Later, the assigned Assistant State Attorneys were instructed to meet with police detectives and determine whether the actions of Officer Portal constituted a criminal act. Based on crime scene reports and testimonial evidence compiled, it is concluded that this was an accidental shooting with no intent of harm. Therefore, no criminal charges will be filed against Officer Edward Portal (97-0404).

The members of the staffing/review team for this case are:

 _____ Don L. Horn	 _____ Deisy Hernandez	 _____ Kathleen Hoague
 _____ Stephen K. Talpins	 _____ Howard Rosen	 _____ /s/ J. Scott Dunn
 _____ Christine Zahralba	_____	_____

Approved by State Attorney on this 15 day of June, 2020.



KATHERINE FERNANDEZ RUNDLE
State Attorney



INTEROFFICE MEMORANDUM

TO: STAFFING/REVIEW TEAM

DATE: MAY 19, 2020

FROM: MICHAEL VON ZAMFT AND
ALICIA PRIOVOLOS
Assistant State Attorney

RE: POLICE SHOOTING CLOSE-OUT MEMO
CASE # SI 2019-01

OFFICER INVOLVED:	OFFICER EDWARD PORTAL, DORAL POLICE
INJURED:	SGT. ERIC FERNANDEZ, DORAL POLICE
INJURIES:	ONE GUNSHOT WOUND TO THE UPPER LEFT CHEST
DATE & TIME:	JULY 26, 2019 AT APPROXIMATELY 11:39 AM
LOCATION:	MIAMI DADE PUBLIC SAFETY TRAINING INSTITUTE, SHOOT HOUSE #1; 9601 NW 58 STREET, DORAL, FL 33178
WEAPON:	ONE GLOCK 9MM, MODEL 17, SERIAL NUMBER UUS966
LEAD INVESTIGATOR:	ADAM GILLILAND, MDPD HOMICIDE UNIT & LUIS MITJANS, DORAL PD INTERNAL AFFAIRS
MDPD CASE #: DORAL PD CASE #: SAO CASE #:	PD190626228047 SI 2019-01

SUMMARY OF THE FACTS

On July 26, 2019, at approximately 11:39 a.m., Sgt. Eric Fernandez was accidentally shot in the upper chest by Officer Edward Portal during a police training exercise at the Miami Dade Public Safety Training Institute. Sgt. Fernandez was immediately taken to Jackson Trauma in serious condition. Miami Dade Police Homicide Unit and Doral Police Internal Affairs Unit responded to the scene and began independent investigations. The Miami-Dade State Attorney's Office Police Shooting On-Call Prosecutors were not notified of the incident nor requested to respond to the incident location on the date in question. Sgt. E. Fernandez made a full recovery from his injuries.

In August of 2019, Assistant State Attorneys Michael Von Zamft and Alicia Priovolos were requested by Chief Assistant Don Horn to meet with detectives and review the incident to determine whether the actions of Officer Portal constituted a criminal act, and if so, whether they can be proven beyond and to the exclusion of every reasonable doubt. Assistant State Attorneys Michael Von Zamft and Alicia Priovolos reached out to the Doral PD and received preliminary reports from IA Investigator Luis Mitjans. A meeting was later scheduled with Investigator Luis Mitjans to discuss the status of the investigation. Further documentation was later provided by Luis Mitjans, which included MDPD reports, Doral PD reports, copies of the interviews, and personnel files for Sgt. Eric Fernandez and Officer Edward Portal. Assistant State Attorney Alicia Priovolos reached out to PBA attorney Griska Mena, who confirmed the shooting officer (Portal) would not be providing a voluntary statement or proffer.

The following was learned: The shooter in this case (Officer E. Portal) and the person that was injured (Sgt. E. Fernandez) are both employed by the Doral Police Department. Fernandez is a field training officer and certified instructor for the police department; Portal is not. On the date in question, Fernandez scheduled a last-minute training for officers on "entry tactics and room search training." Sgt. Fernandez asked Officer Portal to assist him in conducting this training.

At approximately 9:30 am, Sgt. Fernandez called and/or texted his squad informing them of the impromptu training and asking them to attend. They were instructed to report that same morning to "north shoot house" at the Miami Dade Public Safety Institute, located at 9601 NW 58 Street, Doral, FL 33178. This training was a non-firearm training that was intended to teach the trainees how to search a room and avoid being shot by an unknown intruder. The training commenced at 10:00 am. Fernandez'

squad completed the training without issue. A second squad then received the same request to attend. It was during the second squad's training that the incident in question occurred.

In sworn statements, members from both squads indicated Fernandez and Portal instructed the trainees to secure their weapons and ammunition in the trunk of their vehicles before entering the shoot house. The trainees were then given a red training gun which emitted a red laser when the trigger was pulled. Fernandez and Portal gave instructions to the officers performing the training scenario from the "the catwalk," as well as from the floor. The "catwalk" is a name given to a platform inside the shoot house that is located on the second level of the building. It is an open walkway that allows instructors to see what is happening in the room/floor beneath them. Despite their instructions to trainees to be unarmed inside the shoot house, most trainees noted Fernandez and Portal remained armed with their departmental issued firearms throughout the training. One trainee recalled Fernandez saying Portal would be the only person to remain armed, "in the event a situation was to present itself where police action became imminent." Trainees described multiple scenarios where Fernandez and Portal walked downstairs, asked them for their red training guns and role played. They also described both Fernandez and Portal providing them with constructive criticism after scenarios were played out.

During a drill called the "button hook" entry, Fernandez left the cat walk and went down to the first level to further instruct a trainee how not to perform this drill. Fernandez signaled Portal to come down to the first floor and join him. Fernandez explained his intent was to demonstrate how the "button hook" entry was ineffective. Portal was seen entering the room that would be searched. Portal assumed the role of the "unknown" in the room, and Fernandez assumed the role of the officer clearing the room. Fernandez asked one of the trainees for their red training gun and began to perform the drill. When Fernandez entered the room to be searched, a gunshot was heard. Fernandez was then heard by one trainee saying "fuck, you shot me!" Immediately thereafter, Fernandez was aided by the trainees and medical help was requested. Most trainees only focused on Fernandez and were unable to describe Portal's actions after the shooting. Two trainees noted Portal was visibly distraught and was instructed to sit on a picnic table on the east side of the shoot house and not to speak to anyone. PBA lawyers later confirmed Portal would not be giving a statement or a proffer.

MDPD crime scene processed the scene while MDPD Homicide Unit conducted interviews of the trainees that were present during the second training. Doral PD IA conducted additional interviews,

including interviews of the trainees that were present during the first training. Statements were generally consistent, with some minor exceptions. Described throughout many of the interviews was the impromptu nature of the training and trainees' discomfort with Fernandez and Portal being armed during the training exercises. There was no evidence uncovered of any ill will between Fernandez and Portal. To the contrary, it was learned Fernandez and Portal are good friends and remain good friends even after this incident.

Fernandez was interviewed two times by the MDPD Homicide Unit. The first interview was conducted by Detective Jessica Alvarez at the hospital, on the day in question. The second interview occurred on July 2, 2019 by MDPD Detectives Pedro Camacho and Armando Gonzalez. Both interviews were generally consistent. In the first interview Fernandez denied knowing who shot him. During the second interview Fernandez indicated he learned Portal was the shooter, but he did not see him shoot. Fernandez was unable to explain and did not recall why or what Portal was doing in the room where the training exercise was occurring as he was "not actively participating in the training exercises." Fernandez conceded he made the decision to have Portal remain armed throughout the training exercise because Portal's role was being a set of eyes for him and he wanted Portal armed in the event a situation presented itself where police action became imminent. Fernandez denied he was armed during the training exercises.

ANALYSIS

The role of the State Attorney in this investigation and in conducting this review is limited to determining whether a criminal violation of Florida law has occurred, whether any person may be held criminally responsible, and whether such criminal responsibility can be proven beyond a reasonable doubt in a court of law. The State Attorney does not establish agency policy, procedures, or training requirements. Nor does the State Attorney have any responsibility for determining disciplinary action or pursuing civil litigation in these matters. In other words, given the applicable law, the State Attorney's role is to determine whether the actions of Officer E. Portal constituted a criminal act, and if so, can it be proven beyond and to the exclusion of every reasonable doubt.

In Florida, accidental firearm discharge cases are analyzed under the legal theory known as culpable negligence. The criminal offense of culpable negligence is codified in section 784.05, Florida Statutes. Subsection (2) provides: "Whoever, through culpable negligence, inflicts actual personal injury

on another commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.” The term culpable negligence is defined in the Florida Standard Jury Instructions in Criminal Cases as follows:

Every person has a duty to act reasonably toward others. If there is a violation of that duty, *without any conscious intention to harm*, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights. The negligent act or omission must have been committed with an utter disregard for the safety of others. *Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.* Fla. Std. Jury Instr. (Crim.) 7.7 (emphasis added); *see also Getsie v. State*, 193 So.2d 679, 681-82 (Fla. 4th DCA 1967).

This definition indicates culpable negligence looks at both a defendant’s actions and his state of mind (common law concepts known as *actus rea* and *mens rea*, respectively) The *actus rea* relates to the reckless behavior itself while the *mens rea* requires that the defendant be consciously aware that he is engaging in such reckless behavior. The state must satisfy each to prove a defendant guilty of culpable negligence.

Furthermore, Florida case law has held that an accidental firearm discharge does not always rise to the level of culpable negligence necessary to constitute a crime. Accidental discharges can at times be simple or gross negligence; neither of which amounts to criminal liability. *J.A. v. State*, 593 So.2d 572 (Fla. 3d DCA 1992); *A.T. v. State*, 658 So.2d 662 (Fla. 3d DCA 1995) (quoting *Dominique v. State*, 435 So.2d 974, 974 (Fla. 3d DCA 1983)). Culpable negligence comes into play when there is evidence of a course of conduct showing reckless disregard of human life there, such as actors engaged in an argument or physical combat prior to the accidental discharge, negligent actors under the influence of drugs or

alcohol, or actors playing with or recklessly handling a firearm in the presence of others. *J.A.*, 593 So.2d at 573; *Cunningham v. State*, 385 So.2d 721 (Fla. 3d DCA 1980); *McBride v. State*, 191 So.2d 70 (Fla. 1st DCA 1966).

The evidence collected by investigators indicates Portal discharged his firearm *without any conscious intention to harm*. Portal was in the middle of a role-playing scenario when he discharged his firearm apparently believing it was a training gun which is incapable of harming anyone. There is no evidence of ill will or intent to harm between Portal and Fernandez. Accordingly, the *mens rea* required for culpable negligence is absent. Equally, so is *actus rea*.

The *actus rea* of culpable negligence requires Portal's behavior to have been of "such a gross and flagrant character that it evidenced a reckless disregard for human life or safety equivalent to an intentional violation of the rights of others." *J.A.*, 593 So.2d at 573. Portals behavior does not equate to gross and flagrant. The factors the *J.A.* court indicated established evidence of "gross and flagrant character" are lacking in this case. *Id.* at 573. The totality of the evidence in this case indicates that at the time Portal accidentally shot Fernandez, Portal was not engaged in an argument or physical combat with Fernandez. In fact, much like in *J.A.*, there was not the slightest bit of animosity between Portal and Fernandez; the two were and continue to be friends after this incident. Portal was also extremely remorseful after the incident, a factor considered by the *J.A.* court. Finally, Portal was neither under the influence of drugs or alcohol, nor was he playing with or recklessly handling a firearm in the presence of others. "Under these circumstances, Florida courts have consistently held that such an accidental firearm discharge may be the product of simple or gross negligence by the accused but cannot rise to the level of culpable negligence." See *J.A.* at 573.

Therefore, there is insufficient evidence of a criminal act. Accordingly, Assistant State Attorney's Michael Von Zamft and Alicia Priovolos recommend taking no further action on the behalf of the State Attorney.

Respectfully submitted by:

Michael Von Zamft

/s/ Michael Von Zamft
Assistant State Attorney

Alicia Priovolous

/s/ Alicia Priovolos
Assistant State Attorney